

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

WILLIAM COBB
PETITIONER,

Vs.

UNITED STATES OF AMERICA
RESPONDENT.

CIVIL ACTION NO. 09-cv-916 (ARR)

RENDERED : JANUARY 26, 2010

MOTION FOR RELIEF FROM JUDGMENT

PURSUANT TO FED. R. CIV. PROC 60(b)

I. INTRODUCTION

Comes Now William Cobb hereinafter ("Cobb ") in the above-entitled cause for action, acting in pro se capacity and hereby seeks habeas corpus relief in the form of " re-opening " the collateral process of review wherein the United States District Court rendered the January 26, 2010 judgment denying the subject challenged due to the ineffective measures of defense counsels representation at critical stages of the proceeding.

II. JURISDICTION

The United States District Court is with irrefutable subject matter jurisdiction over the fair administration of justice over this case or controversy pursuant to Federal Rules of Civil Procedures 60(b).

III. FACTUAL BACKGROUND

The following background statements are taken from the procedural travels and should be presumed true for purpose of review hereunder:

In the original motion to vacate filed in the district court on , 20 , Cobb raised a plethora of challenges to the constitutionality of his conviction and sentence, one of which are at issue here. Specifically, argued that defense counsels performance during the sentencing proceeding and on direct review fell well below the objective standard of reasonableness as dictated by Strickland v. Washington (1984) precede by Rompilla v. Beard (2005). The basis for the arguments was premised on counsels failure to abject to the imposition of the prior drug felony sentencing enhancemnt under Title 21 U.S.C. § 851

On January 26, 2010 the District Court denied Cobb's habeas petition there- to the subject challenged based on the rationale that the, 1989 prior conviction under N.Y. Penal Law § 220.06 qualified for the §851 enhancemnt because section 220.06 contained a " intent to sell " component, and thus, defense counsel has no reason to object . The Court also ordered that a certificate of appealability not issue in this case pursuant to Title 28 U.S.C. § 2253. Cobb filed a timely notice of appeal to wit: was denied on June 24, 2010.

IV. STANDARD FOR REVIEW

Rule 60(b) of Fed. R. Civ. Proc . allows the court to relieve a party from a final judgment. See FRCP 60(b). A motion pursuant to Rule 60(b) is " addressed to the sound discretion of the District Court and [is] generally granted only upon a showing of exceptional circumstances" Evidence in support of a motion to vacate a final judgment [must] be convincing. A true motion under Rule 60(b) must be predicated on one of the five (5) narrow and specific grounds enumerated or on a sixth (6) ground, which, despite its open wording, has been narrowly cabined by the Second Circuit precedents. United States v. Harris, 367 F.3d 74,80 (2nd Cir. 2004) and see Rodriguez v. Mitchell, 252 F.3d 191,198 (2nd Cir 2001). They include the following:

- (1) mistake, inadvertance, surprise or excusable neglect
- (2) newlydiscovered evidence.. . .(3) fraud. . . .(4) the release or discharged of a prior judgment upon which it is based has been reversed or otherwise vacated; (5) or it no longer equitable that the judgment should have prospective application or (6) any other reason justifying relief form the operation of the judgment.

Cobb identifies Rule 60(b)(1) and (6) as grounds on which to re-open his habeas proceeding. Any motion brought under the premises of mistake, Rule 60(b) (1) must be filed " not more tha one year after the judgment, order or proceeding was entered or taken. " This matter is timely whereas, the denial of the motion to vacate occurred on January 26,2010. The second ground, ineffectiveness ofcounsel can meet the stringent standard under Rule 60(b)(6), which only affords relief in " extraordinary circumstances ". A lawyers failures must be so egregious and profound that they amount to the abandonment of its clients case altogether, either through physical disappearance or constructive disappearance. Cobb relies on the Supreme courtholding in Glover v. United

States (2001) 531 U.S. 198,202 holding:

" a claim of ineffectiveness of counsel which led to sentencing errors is cognizable on § 2255 as constitutional violation "

critical evidence and applicable circuit law, in support of the claim of ineffective assistance of counsel was overlooked and supplies just cause to re-open the habeas proceeding to give consideration on what actual effect the application and implementation thereof had or reasonably may be taken to have had upon " outcome of habeas proceeding ".

V. ISSUES PRESENTED

WHETHER THE CERTIFICATION OF DISPOSITION AND SECOND CIRCUIT PRECEDENTS DETERMINE OF FINDING THE FACTUAL BASIS FOR THE CLAIM OF INEFFECTIVENESS OF COUNSEL WARRANTED AN EVIDENTIARY HEARING

In the wake of the United States Supreme Courts decision in shepard v. United states (2005) 544 U.S. 13, 125 S.Ct. 1254, 161 L. Ed 2d 205 which afforded the lowers courts a list of universal documentation to be used to determine substance of a prior conviction for purpose of the recidivist enhancements. See 2010 , U.S. App Lexis 14659, Landazury v. Holder [july 19,2010] ;United States v. Rosa, 507 F.3d 142 (2nd Cir. 2007) and United States v. Green, 480 F.3d 627,632 (2nd Cir. 2006)(noting the importance that a certificate of disposition falls within the purview of documents listed to determine a defendnats status under the

recidivist statute). In Green, a case more similar to the case at bar, the Second Circuit held that the district court had not erred by rejecting the defendant's claims that the certificate of disposition outlining the prior offense of conviction under N.Y. Penal Law. In so holding, the court ruled that the certificate of disposition constitutes as "some comparable judicial records of information" in which, the court was allowed to consider in making its determination about the applicability of the recidivist statute.

In his case, the defendant asserts and contends that the certificate of disposition proffered by the government in the December 11, 2009 letter as Exhibit C was overlooked as evidence that constituted as presumptive evidence of the facts of his conviction of the April 13, 1989 offense. As in Green, the Government was unable to obtain either the formal judgment or the transcripts of the plea proceeding in this case. The Government as in Green stipulated to the certificate of disposition. Unlike Green, however, Cobb does not challenge the admissibility of the documentation, in that, it should not be used, Cobb asserts that the certificate of disposition is the only reliable evidence made available to relay what the actual 1989 offense of conviction in Kings County was.

Cobb avers that, had the court given just consideration to the applicable law as referenced above in terms of the certificate of disposition his sentence [unconstitutionality thereof] based on counsel's ineffectiveness: failing to object and obser-

ving the stipulated evidence as proffered by the government in its opposition motion that the 1989 conviction was for simple possession and not possession with intent to sell, would have been substantially different. See Glover, supra (any unwarranted term of imprisonment is pre se prejudice). In Short, the certificate of disposition makes all the more different the courts ruling had said documentation not been overlooked. For the reasons stated above the collateral proceeding should reopen to afford just consideration of the certificate of disposition to undermine the 120 month increase in sentence as a result of the application of the recidivist statute under Title 21 USC § 851.

Secondly, the fact that this court adopted facts from the PSR to determine the 1989 conviction also birth and error in judgment. The gathering of information contained in the presentence report is not an exact science. Because the information is the presentence report may be unfounded malicious gossip, inaccurate, or materially false (as shown here) the district court should have treaded warily, without acting blindly upon the serious allegation, absent guarantees of reliability of the information contained therein. U.S. v. Johnson, 378 F.3d 230,241 (2nd Cir. 2004) (sentencing courts not obligated to accept all unchallenged portions of the psr as fact)

When a criminal defendant challenge the veracity of the evidence contained in the presentence report, prosecution, not the defendant, must introduce corroborating proof. U.S. v. Halguin,

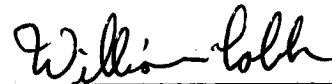
436 F.3d 111, 119 (2nd Cir. 2006)(Government bears the burden of establishing a factor that would result in an enhancement of the defendant's sentencing range) and see *Torres v. Berbay*, 340 F.3d 63,72 (2nd Cir. 2003)(Due process violated where sentencing decision based only on report filled with hearsay, speculation and uncorroborated accounts). Cobb asserts and contends that, the district court adoption of the information in the PSR to determine the applicability of the § 851 enhancement was error. Wherefore, the information adopted from the Northern District Presentence report was rejected by said court in the sentencing phase. see Exhibit B hereinattached.

To establish the accuracy of the prior conviction, the probationer officer, as a result of the department in which, the records where of the 1989 conviction were kept were destroyed in a devastating fire, turn to the contention cited in the the Presentence report in the Northern District. Defense counsel failed to object nor did the district court observed that the evidence in the Northern District psr was rejected at the sentencing proceeding as basis for the career offender provision based on the rationale that the records as provided did not provide a rational basis for finding the 1989 conviction was for possession with the intent to sell. By adopting the Psr form the Northern district to determine the applicability of the § 851 enhancement, the court adopted the findings that the 1989 conviction was for criminal possession in the fifth degree. see Exhibit B.

This case is and example of how the governments overreaching supplied cause for the defendant to bring forth a cognizable claim of ineffectiveness of counsel. The January 26, 2006 order should dismiss and the matter reopened to assess the reliability of the contention herein and hereto support the issuance of the desired relief. The veracity of the judgment under attack renders a evidentiary hearing warranted. see B. This case is awashed with legal error regarding the 1989 prior conviction. It is clear that, when the determination of the evidence is based on the psr assertion, which , in this case was rejected in one court and adopted by another court, without realizing such, than the question of reliability in terms of the prior conviction becomes an issue.

Wherefore, premeises considered, Cobb prays that this court will inquiry into the records and reopen the collateral proceeding to ascertain the findings thereto was not based on unfounded malicious gossip and inaccurate formation moreso, oversight of the necessary documentation and legal authority to discern whether the 1989 prior conviction rendered applicable the § 851 recidivist enhmancement.

RespectFully Submitted

A handwritten signature in cursive script, appearing to read "William Cobb", written in dark ink.

William Cobb

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK NO FEE
KINGS COUNTY
320 JAY STREET
BROOKLYN, NY 11201

CERTIFICATE OF DISPOSITION - SUPERIOR COURT INFORMATION

DATE: 12/09/2009

CERTIFICATE OF DISPOSITION NUMBER: 15710

PEOPLE OF THE STATE OF NEW YORK
VS.

CASE NUMBER: SCI-01992-89
LOWER COURT NUMBER(S):
DATE OF ARREST: 01/12/1989
ARREST #: K89003109
NYSID #: 6081476R
DATE OF BIRTH: 05/16/1968

BB, WILLIAM H

DEFENDANT

HEREBY CERTIFY THAT IT APPEARS FROM AN EXAMINATION OF THE RECORDS
FILE IN THIS OFFICE THAT ON 02/09/1989 BEFORE THE HONORABLE
Y, J THEN A JUDGE OF THIS COURT, THE ABOVE NAMED DEFENDANT
ENTERED A PLEA OF GUILTY TO THE CRIME(S) OF

CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE 5th DEGREE PL 220.06 01 DF

AT ON 04/13/1989 THE ABOVE NAMED DEFENDANT WAS SENTENCED
BY THE HON. KAY, J, THEN A JUDGE OF THIS COURT TO

CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE 5th DEGREE PL 220.06 01 DF
SENTENCE = 5 YEAR(S)

AT ON 03/06/1997 THE ABOVE NAMED DEFENDANT WAS RESENTENCED
FOR A VIOLATION OF PROBATION BY THE HON. HUBSHER, M
ON A JUDGE OF THIS COURT TO:

CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE 5th DEGREE PL 220.06 01 DF
SENTENCE = 90 DAY(S)

WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND AFFIXED MY
OFFICIAL SEAL ON THIS DATE 12/09/2009.

Nancy T. Sunshine

COURT CLERK

NANCY T. SUNSHINE
Kings County Clerk

EXHIBIT B

042204-Cobb.txt

24 important, as you say, when you are in prison and
25 out of prison the things you find there, which is

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□

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(USA v. Cobb)

1 Bible study and education, and whether it's in
2 prison or it's out of prison, you can have it
3 wherever you go. And I think when you do get out
4 you are going to hang with good people and I think
5 your faith is going to keep you out of prison and
6 you are still going to have good years and good life
7 with your family.

8 But there is going to be some hard
9 times again, obviously. Again you have God, you
10 have the church and study, you can make good out of
11 that too.

12 In my finding, contrary to the
13 findings recommended in the presentence report the
14 defendant's April 13th, 1989 conviction for criminal
15 possession of a controlled substance 5th, although
16 properly scored under Section 4A1.1b of the
17 Sentencing Guidelines should not be considered for
18 career offender under Section 4B1.1

19 Specifically, all the documentation
20 has been received from Kings County Supreme Court
21 which clearly details the disposition as initially a
22 sentence of probation and subsequently 90 days
23 incarceration for a violation of that probation.
24 The Court finds that it's unclear as to why there

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 25 was the violation filed and there is a lack of

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(USA v. Cobb)

1 documentation as to the circumstances of this
 2 presentencing and therefore the defendant is not a
 3 career offender as scored in the Presentence
 4 Investigation Report.

5 Furthermore, the Court has
 6 determined the Presentence Report correctly does
 7 score the criminal history section of the report and
 8 thus the defendant is not safety valve eligible.
 9 Therefore, the defendant's total offense level is
 10 29, criminal history category 2, guideline
 11 imprisonment range is 97 to 121 months. However,
 12 since the statutory mandatory minimum sentence is
 13 120 months, the applicable guideline range becomes
 14 120 to 151 months, pursuant to the U.S.S.G. Section
 15 5G1.5(c)(2).

16 Upon your plea of guilty to Count 6
 17 of the indictment and pursuant to the Sentencing
 18 Reform Act it is the judgement of this Court that
 19 you are hereby committed to the custody of the
 20 Bureau of Prisons to be imprisoned for a term of 120
 21 months. Additionally, the Court does recommend that
 22 the defendant participate in the Bureau of Prisons
 23 comprehensive residential drug treatment program or
 24 any other drug treatment program. Upon release from
 25 imprisonment you shall be placed on supervised

42.8
 24.6
 18.2

(32)